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CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

METRO FUEL LLC, a Delaware limited  
liability company,

Plaintiff,

vs.

CITY OF SAN FRANCISCO, a municipal  
corporation, COUNTY OF SAN  
FRANCISCO, a subdivision of the State  
of California, CITY AND COUNTY OF  
SAN FRANCISCO, a chartered California  
city and county and DOE 1 through DOE  
10,

Defendants.

Case No. C07-6067 JSW

**DECLARATION OF KERSTIN F.  
MAGARY IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR A  
PRELIMINARY INJUNCTION**

Hearing Date: November 14, 2008  
Time: 9:00 a.m.  
Place: Courtroom 2, 17<sup>th</sup> Floor

Trial Date: October 26, 2009

1 I, KERSTIN MAGARY, declare:

2 1. I have personal knowledge of the matters stated herein, except for those matters set  
3 forth on information and belief, which I believe to be true, and if called to testify, I can and will  
4 testify competently as to all matters set forth herein.

5 2. I am a Senior Manager for the Finance and Information Technology Division – Real  
6 Estate Section for the San Francisco Municipal Transportation Agency ("SFMTA"). I manage seven  
7 people who work on all of SFMTA's real estate (leases, MOU, licenses, tenant improvements, joint  
8 and transit oriented development), the Transit Shelter Advertising Agreement with Clear Channel  
9 Outdoor, the Transit Advertising Contract with CBS Outdoor, Requests for Proposals and other  
10 opportunities to find new sources of revenue for SFMTA. I have held this position since 2007. Prior  
11 to my current position, I was Senior Project Manager for SFMTA for 9 years, July 28, 1998 – 2007.  
12 Prior to that I worked in the private sector in real estate and transportation project management and  
13 management for two decades. As a Senior Project Manager, I managed teams of people and the  
14 Electric Trolley Bus Procurement and Warranty Project, seven Historic Streetcar Projects, and  
15 SFMTA's Real Estate. From approximately 2000 on, I also managed the City's Transit Advertising  
16 Contract with CBS Outdoor, which expires on June 30, 2009, and the Advertising Transit Shelter  
17 Agreement, which expired December 9, 2007.

18 3. **Advertising Transit Shelter Agreement with CBS Outdoor.** On June 10, 1987, the  
19 City and County of San Francisco ("the City") entered into an "Advertising Transit Shelter  
20 Agreement" with Gannett Outdoor Company for the placement of commercial and noncommercial  
21 transit shelters throughout San Francisco. On January 5, 1990, the City approved the First  
22 Amendment to the "Advertising Transit Shelter Agreement." On March 12, 1991, the City approved  
23 an assignment of the "Advertising Transit Shelter Agreement" from Gannett Outdoor Company to  
24 Combined Communications Corporation. On November 18, 1994, the City approved the Second  
25 Amendment to the "Advertising Transit Shelter Agreement," to maintain the high-level boarding  
26 platform on 19<sup>th</sup> Avenue at Stonestown in exchange for advertising on the platform, and allowing  
27 advertising kiosks on Upper Market Street in conjunction with shelters on median boarding islands.  
28

1 On March 2, 1998, the City approved the Third Amendment to the "Advertising Transit Shelter  
2 Agreement," to provide, among other things, for advertising on median boarding islands and high-  
3 level boarding platforms along The Embarcadero, and an increase in the minimum and maximum  
4 number of transit shelters allowed in San Francisco. A true and correct copy of a compilation of the  
5 First through Third Amendments to the "Advertising Transit Shelter Agreement" is attached as  
6 Exhibit A.

7 4. On December 4, 2006, the SFMTA notified CBS Outdoor that the City approved the  
8 Fourth Amendment to "Advertising Transit Shelter Agreement" containing agreements regarding the  
9 rights and responsibilities of CBS Outdoor regarding certain transit shelters. A true and correct copy  
10 of a compilation of the Fourth Amendments to the "Advertising Transit Shelter Agreement" is  
11 attached as Exhibit B.

12 5. **Number of Transit Shelters.** Under the Advertising Transit Shelter Agreement, CBS  
13 Outdoor was required to construct a minimum of 1,100 transit shelters and was allowed to construct a  
14 maximum of 1,250 transit shelters.

15 6. At the end of the Advertising Transit Shelter Agreement with CBS Outdoor, there  
16 were 1063 transit shelters. Of those 1063 transit shelters, advertising was allowed on up to 697  
17 transit shelters ("Commercial Shelters") and not allowed on 366 shelters ("Noncommercial Shelters").  
18 There were also 8 historic transit shelters that were Noncommercial Shelters. In addition, there were  
19 34 kiosks.

20 7. According to the SFMTA's Service Planning staff, hundreds of other proposed  
21 locations were requested during the term of the Advertising Transit Shelter Agreement with CBS  
22 Outdoor. But the San Francisco Department of Public Works denied CBS Outdoor's permit  
23 applications for these locations due to objections and protests from adjoining property owners and/or  
24 neighbors.

25 8. **Limits on Advertising in Transit Shelters.** The Advertising Transit Shelter  
26 Agreement limited the number of structures on which CBS Outdoor could have placed advertising.  
27 Under Section I.D.2, "[t]he commercial and non-commercial shelters [were to] be constructed at a  
28 ratio of two (2) commercial shelters to one (1) noncommercial shelter."

1           9.       The Advertising Transit Shelter Agreement also limited where the advertising could be  
2 placed on a transit shelter. Under Section I.D.4.a, CBS Outdoor was only authorized "to use the  
3 'downstream' side wall (furthest from approaching transit vehicles), the back panel, or outside panel  
4 of the downstream side wall of any advertising transit shelter. In addition, excepted in limited  
5 locations, CBS Outdoor was prohibited from placing advertisements on more than one wall of any  
6 transit shelter. Finally, any advertisements were not to exceed twenty-four square feet.

7           10.      Under the Advertising Transit Shelter Agreement, the City also retained the right to  
8 place transit information on every transit shelter and kiosk. Under Section IV.A, the City "reserve[d]  
9 the right to place on all transit shelters its informative material," including maps, schedules, and  
10 service bulletins."

11           11.      **Location of Transit Shelters.** Under the Advertising Transit Shelter Agreement the  
12 City retained the right to designate the locations of all transit shelters and kiosks. Under Section  
13 I.D.3, the City had "the right to designate all shelter locations, including specification of which sites  
14 [were] available for commercial advertising."

15           12.      **Maintenance and Repair of Transit Shelters.** Under Section V.B. of the  
16 Advertising Transit Shelter Agreement, CBS Outdoor was required to inspect most transit shelters  
17 and kiosks a minimum of twice per week. In the course of each inspection of a Shelter or Kiosk,  
18 CBS Outdoor was required to "remove all Graffiti, stickers, posters, litter, dust, dirt, and weeds from  
19 each shelter, and from a five-foot radius surrounding the shelter."

20           13.      Under Section V.B.4 of the Advertising Transit Shelter Agreement, CBS Outdoor was  
21 required to repair any damage within 48 hours. In addition, "[i]f the shelter or kiosk was destroyed,  
22 [CBS Outdoor] [was required to] remove the shelter or kiosk remains within twenty-four 24 hours"  
23 and "replace the shelter or kiosk within thirty 30 days."

24           14.      **Design of Transit Shelters and Kiosks.** Prior to the City's entering into the  
25 Advertising Transit Shelter Agreement, the San Francisco Arts Commission approved designs for the  
26 transit shelters CBS Outdoor was required to install and maintain. Under Section VIII.C.4, CBS  
27 Outdoor was only allowed to construct shelters based upon the designs approved by the San  
28 Francisco Arts Commission.

1           15.     In order to create safe transit shelters for MUNI riders, passing vehicle operators and  
 2 the public, the Advertising Transit Shelter Agreement imposed minimum design and placement  
 3 specifications for new transit shelters and kiosks. Under Section VIII.C.4.b, CBS Outdoor was  
 4 required to design and construct transit shelters and kiosk to meet certain minimum design  
 5 requirements.

6           16.     For example, under Section VIII.C.4.b(9) each transit shelter and kiosk was to be  
 7 designed and constructed to ensure compliance with the Americans with Disabilities Act.

8           17.     As another example, under Section VIII.C.4.b(11), each transit shelter "must not be so  
 9 illuminated as to be hazardous to passing vehicle operators."

10          18.     **Payments Under the Advertising Transit Shelter Agreement.** Under Section  
 11 8A.109 of the San Francisco Charter the SFMTA is required to diligently seek to develop new  
 12 sources of funding for the Agency's operations. CBS Outdoor's payments went into MUNI's  
 13 Operating Budget and supported, among other things, low transit fares for MUNI riders. MUNI's  
 14 transit fares are significantly lower compared to other agencies locally and nationally.

15          19.     CBS Outdoor also made annual payments for administrative and marketing fees, and  
 16 for the Arts Commission.

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**SIGNATURE ATTESTATION**

(U.S.D.C. N.D. Cal. General Order 45, Section X.B.)

I obtained the concurrence in the filing of this document from the signatory of this declaration, in compliance with U.S.D.C. N.D. General Order 45, Section X.B.

Dated: August 29, 2008

DENNIS J. HERRERA  
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By:                     /S/                    .  
THOMAS S. LAKRITZ

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